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EXAMINER

WEINSTEIN, STEVEN L

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 08/26/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/023770

Applicant(s)

DAVID E

Examiner

S. WEINSTEIN

Group Art Unit

1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- ☐ Responsive to communication(s) filed on _____
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-11 is/are pending in the application.
- ☐ Of the above claim(s) _____ is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-11 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some* ☐ None of the:
 - ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____
 - ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s) 2
- ☐ Interview Summary, PTO-413
- ☒ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Other _____

Office Action Summary

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 5, 6, 8, 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reference N (SWITZ. 564330) in view of Stewart (WO 95/08271) further in view of Inoue (JAP 2000004827), Brauns-Heitmann (DE 19525519), Hoogeveen (Ne 8403182) and Yoshifuji et al (2000-152757) further in view of Reference U. and Gajewski (4,251,561).

In regard to claim 1, Reference N discloses an edible make-up composition that can be homogeneous and has a specific predetermined configuration and "whereby" a person can apply make-up or indicia to the body. Stewart, Inoue, Brauns-Heitman, Hoogeveen, and Yoshifuji et al teach it was well established to provide edible markers. What one chooses to use the markers to mark or decorate would have been an obvious matter of intended use. Claim 1 recites that the composition is an edible sugar candy composition. Reference N and the other secondary art either are not clear as to the nature of the composition or employ other edible compositions. In any case, as evidenced by Capital Times and Gujeski, it was conventional to provide edible candy lipstick and confectionary markers and to substitute one conventional edible composition for another for its art recognized and applicant's intended function would have been obvious. In regard to claims 3, the art taken as a whole teaches using edible materials if the marker is intended to be eaten including, obviously, the color. In regard

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to claim 2, Reference N and Capital Times specifically discloses lipstick. Note, though, that an edible marker that is called a crayon could also readily be used as a lipstick. In regard to claim 5, the particular conventional flavor one choose to employ would have been an obvious matter of choice. In regard to claim 6, it is notoriously old to add vitamins to both foods and cosmetics and to therefore add a vitamin for its art recognized and applicant's intended function would have been obvious. In regard to claim 8, the particular shape one chooses to provide an article would have been an obvious matter of choice. Products, both edible and inedible, are given any shape one can design a mold for. In regard to claim 10, the particular conventional packaging one chooses is also seen to have been an obvious matter of choice. Products are conventionally individually wrapped such as hard candy mints.

Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Bryan (5876995).

Bryan teaches the conventionality of luminescent colors including those for food use and to modify the combination and substitute one conventional color for another conventional color for its art recognized and applicant's intended function would have been obvious.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of McDonald (3,062,662) and Reference V (Washington Times 6/27/91, p. E3).

Claim 7 recites that the composition is a coated chewable gum. This presumably means that the candy marking material coats the gum. As evidenced by McDonald, it is

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notoriously old to coat gum with a candy coating and as evidenced by Reference V, it is also known to provide a composite product wherein a non-marking candy is coated with marking material such as lipstick. To therefore modify the composition and provide the edible marking composition as an exterior coating as part of a composite would therefore have been obvious.

Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Newsteder (4,778,683) who teaches it is well established to provide an embossed product with indicia selected from words or decorations wherein the embossment is of contrasting colors and to therefore modify the combination for its art recognized and applicant's intended function would therefore have been obvious.

Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Henderson (4449351) and McCLOSKEY (4085560).

Claim 11 recites matchbook shaped packages. As evidenced by Henderson and McClosky, these conventional packages are well established in the art for use with articles other than matches and to modify the combination and substitute one conventional package for another convention package for its art recognized and applicant's intended function is seen to have been obvious.

The remainder of the references cited on the USPTO 892 form are cited as art of interest. It is also noted that on the internet, there is a web site for a candy manufacturer (Koko's) that discloses candy lipstick that has a date of 2001, A & A Global Industries.

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The examiner will attempt to obtain more information on this product. Also, a candy lipstick that colored the lips was apparently manufactured in the 1950's or 1960's. The examiner will try to obtain information about this product as well. Applicant is requested to furnish any information that they may be aware of concerning this product.

Any inquiry concerning this communication from the examiner should be directed to Steven Weinstein whose telephone number is 703-308-0650. The examiner can generally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone number for the organization where this application assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

S. Weinstein/mn
August 21, 2003


STEVE WEINSTEIN
PRIMARY EXAMINER 1761
8/25/03